88-1384

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TELUM, INC., EARL K. COOK and CARL R. KING,
Petitioners,

v.

E.F. HUTTON CREDIT CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should resolve the uncertainty that has existed for over two decades among the courts of appeals over the extent to which the Rules of Decision Act reaches jury trial issues in diversity cases.

2. Whether the court of appeals erred in holding that the effect of fraud in the inducement of a contract on the enforceability of a "jury waiver" provision in a contract between private parties is governed by federal, and not state, law.

LIST OF PARTIES

All parties to the case are listed in the caption. Petitioner, Telum, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1 of the Rules of this Court.

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TELUM, INC., EARL K. COOK and CARL R. KING,
Petitioners,

v.

E.F. HUTTON CREDIT CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Telum, Inc., Earl K. Cook and Carl R. King hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on October 14, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1a-10a) is reported at 859 F.2d 835.

The district court did not issue a memorandum opinion or findings of fact and conclusions of law, but entered judgment (App., *infra*, 13a-15a) based upon a jury verdict. The judgment has not been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1988. A petition for rehearing was denied (App., *infra*, 11a-12a) on November 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Telum, Inc. is a Nebraska corporation that owns various truck stops in the mid-western and western parts of the United States. Petitioners Cook and King are the founders and owners of the corporation. Respondent E.F. Hutton Credit Corporation ("Hutton") was engaged in the business of purchasing and leasing equipment and of providing equipment loans to its customers. App., *infra*, 2a. During the time relevant to this lawsuit, Hutton's Salt Lake City, Utah office primarily provided equipment leases which enabled customers to obtain an optional investment tax credit. Telum was one of Hutton's customers.

On July 20, 1980, Hutton purchased an oil rig from J.P. Exploration, Inc., which Hutton then leased to petitioner Telum, Inc. In turn, Telum sublet the rig to J.P. Exploration, thereby permitting Telum to take a lawful investment tax credit. The lease between Hutton and Telum was personally guaranteed on Telum's behalf by petitioners Cook and King. *Ibid.*

The lease arrangements operated smoothly until J.P. Exploration was sold to a third party, which discontinued payments. Telum then attempted to repossess the rig and discovered for the first time in January 1983 that there was no rig as described by Hutton itself in the schedule attached to the lease agreement between Telum and Hutton. *Ibid.*

Petitioners filed this suit in the United States District Court for the District of Utah, alleging fraud in the

inducement of the lease with Hutton, and seeking 1) to rescind petitioners' obligations under the lease, 2) to obtain restitution for lease payments made by Telum and 3) to recover the actual expenses incurred in repossessing the rig. Hutton counterclaimed, seeking to enforce Telum's lease obligations. App., *infra*, 2a-3a.

Petitioners requested a jury trial. Hutton opposed the request, relying upon a clause in the lease agreement which contained a "jury waiver" in the event of a dispute over the lease. The lease provided that Telum "waives all right to trial by jury in any litigation arising herefrom or in relation hereto." App., *infra*, 4a. The lease also provided that its interpretation would be governed by New York law. Under both New York and Utah law (which New York might use under its conflicts of law standards), it is settled that a jury waiver provision, like every other provision, contained in a fraudulently induced contract is not binding on the defrauded party. See *Kountze* v. *Kennedy*, 147 N.Y. 124, 41 N.E. 414 (1895); *Seneca Wire & Mfg. Co.* v. *Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928); *President and Directors of Manhattan Co.* v. *Monogram Associates, Inc.*, 92 N.Y.2d 579, 580 (N.Y. 1949); *Ogden Valley Trout & Resort Co.* v. *Lewis*, 41 Utah 183, 125 P. 687, 692 (1912) ("Why should he who makes false representations be permitted to profit by them . . .?"); *Frailey* v. *McGarry*, 116 Utah 504, 211 P.2d 840 (1949). See generally 12 *Williston on Contracts* § 1500 (3rd ed. 1970).

Because of the dispute between the parties over whether a jury trial should be permitted, the district court faced a preliminary procedural problem. If there was no fraud in the inducement of the lease agreement, then under the terms of the contract, petitioners were not entitled to a jury on any issues. If, however, there was fraud, then petitioners' rights were unaffected by the "jury waiver" provision in the lease, and a jury in the case would be appropriate. To avoid permitting petition-

ers to defeat the jury waiver provision by a simple allegation of fraud, the district court required petitioners to put on the record their proof of fraud before the court, sitting without a jury. After this preliminary offer of proof, the district court held that there was sufficient evidence of fraud to permit the court provisionally to set aside the jury waiver provision pursuant to state law and allow the jury to determine if there had been a fraud committed.

The case was then tried to a jury. The jury returned answers to special interrogatories and found, *inter alia*, that Telum was induced by Hutton's fraud to enter into the contract. Based upon this verdict, the district court rescinded the contract and dismissed Hutton's counterclaim. App., *infra*, 3a. The district court also granted Telum restitution for monies spent to reacquire some components of the oil rig.

The court of appeals set aside the judgment. App., *infra*, 1a-10a. On the pivotal question of whether the appropriate rule of decision should be one of federal or state law, the court of appeals held that "[t]he right to a jury trial in the federal courts is governed by federal law." App., *infra*, 4a. Accordingly, the court held that the issue of whether there was a waiver of the jury trial right also should be controlled by federal law. The court of appeals, however, found no federal cases involving facts similar to those here and therefore the court relied "by analogy" upon "the federal cases dealing with the effect of fraud in the inducement upon the enforceability of contract arbitration clauses." App., *infra*, 5a.

Based on this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967), that allegations of fraud in the inducement are not sufficient under Section 4 of the United States Arbitration Act, 9 U.S.C. § 4, to justify setting aside an arbitration clause, the court of appeals held that a fraud which in-

duces a party to enter into any other type of contract does not as a matter of federal common law void a jury trial waiver provision. Instead, petitioners were required to prove that they were defrauded specifically into giving up their right to a jury trial. App., *infra*, 5a-6a. Because petitioners had made no such showing, the court of appeals vacated the judgment and remanded for a new trial without a jury.[1] *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision of the Tenth Circuit, overturning a jury verdict and denying petitioners a jury trial that clearly would have been available to them under state law, raises a fundamental and recurring issue concerning the proper interpretation of the Rules of Decision Act, 28 U.S.C. § 1652. The court's reasoning and result implicate two significant problems with which the lower federal courts have struggled in interpreting the Rules of Decision Act since this Court's decision in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). First, the Tenth Circuit incorrectly relied upon the presence of a jury trial issue as a basis for choosing a "federal" rule of decision, even though the Seventh Amendment was completely irrelevant to the proper resolution of the issue. Thus, the holding below directly raises the question of the relationship between this Court's decisions in *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), which dealt specifically with jury trial issues in federal courts, and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), which appeared to lay down more general, and somewhat inconsistent, standards for applying the Rules of Decision Act. The relationship

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[1] Because the case was being remanded for a new trial, the court of appeals also disposed of several additional issues raised by both petitioners and respondent. In so holding, however, the court made clear that it was the jury trial issue that had "dispositive effect." App., *infra*, 4a.

between these two cases has confused the lower courts and permitted inconsistent results for at least two decades.

Second, the court of appeals ignored state contract law as the proper rule of decision solely because the contract provision concerned a matter of procedure. The validity of that approach under the Rules of Decision Act was before the Court last Term in *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S.Ct. 2239 (1988), but the issue was not resolved there because the Court held that the Rules of Decision Act did not apply. This case presents the Court with a suitable vehicle through which to resolve that precise question, which is a matter of substantial practical importance as contractual provisions governing dispute resolution are becoming more popular. Accordingly, the Court should grant the petition to resolve the problem that the Court intended to reach, but did not in *Stewart Organization, Inc.*

1. In *Hanna* v. *Plumer*, *supra*, this Court made clear that the choice of law issues which arise under the *Erie* doctrine involve three separate legal issues. The first involves the constitutional limits on Congress' power to prescribe statutory law for suits brought in federal courts under diversity of citizenship; the second involves the statutory limits provided by the Rules of Decision Act on the power of federal courts to employ wholly judge-made rules in diversity suits to the exclusion of applicable state law; and the third involves the statutory limits specified by Congress in the Rules Enabling Act, 28 U.S.C. 2072, on this Court's power to prescribe non-statutory rules for federal courts.

This case clearly falls within the second category of *Erie* problems which requires the Court to apply the Rules of Decision Act. There is no federal statute or rule of procedure that supplies any rule of decision either with respect to how to interpret a contract that waives a jury or what effect fraud has on the validity of that

waiver and so state law should have been applied. Nevertheless, the court of appeals ignored state law because "[t]he right to a jury trial in the federal courts is governed by federal law." App., *infra*, 4a.

But the issue before the Court—the effect of fraud on a contractual jury waiver provision—in no way implicates anything in the Seventh Amendment. Indeed, if the Seventh Amendment had any relevance to this case, it would tend to favor the availability of a jury trial. See *Simler* v. *Conner*, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength"); *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937) (courts should indulge every reasonable presumption against waiver of jury trial). The Seventh Amendment certainly provides no federal law basis for undermining New York and Utah's public policies, embodied in their common law, of deterring fraudulent conduct by depriving the wrongdoer entirely of the benefits of any tainted bargain. See 12 *Williston on Contracts* § 1500, p. 401 (3rd ed. 1970) ("it would be unjust and inequitable to permit a person who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations").

The court of appeals created a federal rule based on analogy to federal cases dealing with the effect of fraud in the inducement upon the enforceability of a contract arbitration clause governed by Section 4 of the United States Arbitration Act. But the court acknowledged that the Arbitration Act has no applicability to this case. Because there was no federal law basis for its holding, the court of appeals should have followed the mandate of the Rules of Decision Act and looked to state law. See 28 U.S.C. § 1652 ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States . . ."). Instead, the court of appeals has reached a result that conflicts directly with this Court's holding in *Texas Industries, Inc. v. Rad-*

cliff Materials, Inc., 451 U.S. 630, 640-641 (1981), where the Court held that "the vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Article I mean that federal courts are free to develop a common law to govern those areas until Congress acts."

The error committed by the Tenth Circuit raises a more fundamental problem with the *Erie* line of cases, *viz.*, what is the relationship between this Court's analysis in *Byrd* v. *Blue Ridge Rural Elec. Coop, supra* and its reasoning in *Hanna* v. *Plumer, supra.* In *Byrd*, this Court focused its analysis on the relationship between the federal and state systems of doing justice. Within that framework, the Court applied federal law on the issue of whether a particular factual matter had to be decided by a judge or a jury because the state had very little interest in what procedure was used, but the federal court had a substantial interest as "an independent system for administering justice to litigants who properly invoke its jurisdiction." 356 U.S. at 537. Because of the federal court's strong preference for trial by jury, the Court applied a balancing test in deciding that federal law should apply.

In *Hanna*, by contrast, the Court held that the basic focus of the Rules of Decision Act must be on the interests of the litigants. Thus, in deciding whether state law should be selected as the rule of decision in a diversity case, the Court held that the analysis must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468. In setting out this general approach, the Court failed to indicate precisely what was left of the system-oriented balancing approach set out in *Byrd.*

The courts of appeals have made clear that there is no obvious way to reconcile those two opinions. See

e.g., *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc) (*Byrd* is inconsistent with "later authority"); *Feinstein* v. *Massachusetts General Hospital*, 643 F.2d 880, 886 n.8 (1st Cir. 1981) (identifying scholarly analysis of tension between *Byrd* and *Hanna*); *Edelson* v. *Soricelli*, 610 F.2d 131, 140 (3d Cir. 1979). See also *Rovegno* v. *Geppert Bros.*, 677 F.2d 327, 338 (3d Cir. 1982) (Van Dusen, J., dissenting) (noting the need to "reconcil[e]" *Byrd* and *Hanna*). Moreover, the legal commentary generally has noted the inconsistency between the approaches taken in the two cases. See Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974); Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356 (1977).

The Tenth Circuit in this case interpreted *Byrd* and *Simler* v. *Conner*, *supra*, as establishing an enclave of federal common law in diversity cases for issues involving the relation between the judge and jury.[2] In so doing the decision below plainly conflicts with *Hanna*; indeed, the court of appeals completely ignored *Hanna*. There can be no serious question that the legal effect of fraud in the inducement of a contract on the availability of a jury trial involves a matter that would affect a reasonable litigant's choice of forum at the outset of litigation. Moreover, depriving petitioners of a jury trial in this case in federal court, when they clearly would have

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[2] A similar approach has been followed by other courts of appeals. *See, e.g., Wilson* v. *Nooter Corp.*, 475 F.2d 497, 503-504 (1st Cir.), *cert. denied*, 414 U.S. 865 (1973) (federal law applies to size of jury); *Karlson* v. *305 East 43rd St. Corp.*, 370 F.2d 467, 472 n.1 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967) (remittitur). By contrast, still other courts have applied the general approach in *Hanna* to such issues in order to promote fair treatment of litigants and to discourage forum shopping. *See DiAntonio* v. *Northampton-Accomack Memorial Hospital*, 628 F.2d 287, 290-291 (4th Cir. 1980) (*Byrd* does not control what evidence must be presented to the jury).

been given one in state court, is manifestly unfair. It is plain that the protections the law affords victims of fraud should not depend upon whether or not the defendant lives in the plaintiff's state of residence. "Certainly, the *Erie* doctrine has previously been held to require the application of state law on subjects of similar or obviously lesser importance." *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2249 (1988) (Scalia, J., dissenting), citing, *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980); *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198 (1956); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949).

2. Last Term, the Court granted certiorari to determine whether "federal law, rather than state law, governs the enforceability of a forum-selection clause in a contract between two private parties, even though the forum state . . . has a strong public policy against the enforcement of such contractual provisions." Petition for Certiorari at 5, *Stewart Organization, Inc.* v. *Ricoh Corp.*, No. 86-1908. The petitioner in that case specifically posed the question as one arising under the Rules of Decision Act.

This Court in *Stewart Organization, Inc.*, however, held that 28 U.S.C. § 1404 controlled the choice of forum issue and therefore the Court was not required to interpret the Rules of Decision Act as it applies to a contract provision regulating a judicial procedure to be employed in a federal court. The issue of whether state law contract principles can be ignored by a federal court if the provision at issue affects a federal court procedure warrants review by this Court just as much today as it did when the Court granted certiorari in *Stewart*. Under *Erie* it would appear clear that a federal court does not have the authority or power to develop federal common law when faced with issues involving "purely commercial law" and "obligations under contracts entered into and to be performed within the State." 304 U.S. at 75.

The holding below that the federal court was free to ignore state law governing the Telum-Hutton contract gives rise to the same conflict in the circuits that warranted review in *Stewart Organization, Inc.* v. *Ricoh Corp., supra.* The court here, just like the court of appeals in *Stewart,* refused to be bound by state law in deciding whether the procedural requirement in the contract should be enforced in a federal court. That result conflicts squarely with the analysis of the Third Circuit in *General Engineering Corp.* v. *Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-357 (1986), which held that state law controlled such contracts for the following reasons:

> The construction of contracts is usually a matter of state, not federal, common law . . . . Only rarely will federal common law displace state law in a suit between private parties . . . . *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), teaches that federal jurisdiction alone does not create a sufficiently strong federal policy to deny the application of state law.

Accordingly, the court held that the procedural requirement in the parties' contract had to be enforced in accordance with the state's common law rule. See *Colonial Leasing Co., Inc.* v. *Pugh Brothers Garage,* 735 F.2d 380 (9th Cir. 1984) (applying state law to enforce forum-selection clause).[3]

Moreover, the decision whether contract provisions purporting to regulate the adjudicatory process (in the event there is a dispute between the parties) should be

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[3] While the specific holdings in the cases cited in the text do not survive this Court's holding in *Stewart Organization, Inc.*, because of this Court's interpretation of 28 U.S.C. § 1404, their analysis of the Rules of Decision Act remains fundamentally sound as demonstrated by Justice Scalia's dissenting opinion in *Stewart.* 108 S. Ct. at 2245-49 (Scalia, J.) Thus, the basic reasoning in those decisions is absolutely irreconcilable with the result of the Tenth Circuit in this case.

interpreted according to state law is an important practical issue because contracting entities are attempting with increasing frequency to regulate the dispute resolution process by agreement. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 536 (1986) (noting the recent increase in "frequency" of efforts to modify judicial process consensually).[4] If the federal court's interest as an independent entity permits a federal court to ignore the parties' contracts as interpreted under state law, that result will unquestionably "regulate primary conduct" in a way that should be clarified by the Court immediately. *Hanna* v. *Plumer*, 380 U.S. at 476 (Harlan, J., concurring).

The holding of the Tenth Circuit also has dealt a strong blow to the basic federalism principles underlying *Erie*. "Our federalism" reserves to each state many powers; preeminent among them is the authority to safeguard the welfare of its citizens. Utah and New York have expressed a strong public policy against permitting a party who fraudulently induces a contract to benefit from the bargain. See p. 3, *supra*. It may be, as the Tenth Circuit held, that a different policy would be followed if this case were subject to the United States Arbitration Act, but it is not. And it is not within the authority of a federal court to decide for itself that a jury waiver provision is too important to be nullified because of a generalized fraud affecting the contract. The contrary policy judgment was made by the states whose law should be applied here and whose judgments should have been respected.

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[4] *See generally*, Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 Pepperdine L. Rev. 777 (1987); Petillon, *Recent Developments in Alternative Dispute Resolution*, 14 Pepperdine L. Rev. 929, 929 (1987) (ADRs "have gathered substantial momentum over the past several years"); Lambros, *The Alternative Movement: Rekindling America's Creative Spirit*, 1 Ohio State J. on Dispute Resolution, 3, 5 (1987).

As Justice Harlan declared, *Erie* is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna* at 474 (concurring opinion). Because the holding below works a serious reallocation of that authority, the decision to deny petitioners a jury trial in this case warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 86-1375, 86-1496

TELUM, INC., a Nebraska Corporation,
EARL K. COOK and CARL R. KING,
Plaintiffs-Appellees and Cross-Appellants,

v.

E.F. HUTTON CREDIT CORPORATION, a corporation,
Defendant-Appellant and Cross-Appellee.

Oct. 14, 1988

Rex E. Madsen (Reed L. Martineau, Michael C. Carlston and Stephen J. Hill, with him on the brief), Snow, Christensen & Martineau, Salt Lake City, Utah, for plaintiffs-appellees.

Francis M. Wikstrom (T. Patrick Casey, with him on the brief), Parsons, Behle & Latimer, Salt Lake City, Utah, for defendant-appellant.

Before MOORE and BALDOCK, Circuit Judges, and BOHANON, District Judge*.

BALDOCK, Circuit Judge.

This is an appeal from a final judgment in favor of plaintiff-appellee Telum, Inc. (Telum) and from an order denying the motion by defendant-appellant E.F. Hutton

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* The Honorable Luther L. Bohanon, United States District Judge for the Western District of Oklahoma, sitting by designation.

Credit Corp. (Hutton) for a new trial or a judgment notwithstanding the verdict. Telum brought an action to rescind both the lease of an oil drilling rig and the personal guaranties of Telum's owners, Carl King and Earl Cook, with Hutton on the grounds of fraud, breach of contract, failure of consideration, negligent misrepresentation, mutual mistake, unilateral mistake and constructive fraud. Telum also sought special damages on the fraud claim. Hutton counterclaimed to enforce the lease and guaranties.

I.

The parties to this dispute entered an agreement whereby Hutton would purchase from J.P. Exploration, Inc., represented by Robert Pinder, an oil rig which would then be leased to Telum. Telum would then take the appropriate investment tax credit and sublease the rig back to J.P. Exploration. The parties signed the relevant agreements in July 1980, and Telum and J.P. Exploration began making their respective lease and sublease payments.

These payments continued for approximately two years until J.P. Exploration was sold to a third party who discontinued the sublease payments. Telum then sought to repossess the rig and, in the meantime, signed an extension agreement with Hutton which deferred Telum's monthly lease payments for a period of three months. Thereafter, in January 1983, Telum claims it discovered for the first time that the rig was not complete as described in a schedule attached to the lease at the time of the July 1980, closing. Thereupon, Telum sued to rescind the lease and recover restitution consisting of lease payments made and special damages for expenses incurred in retrieving the rig after the sale of J.P. Exploration.

At trial, Telum sought rescission, contending that Ray Welling, an employee of Hutton, made a number of misrepresentations which wrongfully induced Telum to enter

the lease. Hutton counterclaimed to enforce the lease, arguing that Telum's reliance upon Welling was unreasonable. Hutton also claimed that Telum knew of the discrepancies between the lease equipment schedule and the actual rig at the time the extension agreement was signed, thereby waiving any claim for fraudulent inducement. Hutton further asserted that the facts showed the existence of a joint venture between Telum and Pinder. According to Hutton, if there were a joint venture, Pinder's knowledge that the rig was incomplete could be attributed to Telum.

The issues were tried before a jury which answered special interrogatories, finding that (1) Hutton had not proved by a preponderance of the evidence that Telum, Cook and King, at the time that Telum signed the extension agreement, knew about the fraud, and that (2) Telum, Cook and King proved with clear and convincing evidence that they were induced by Hutton's misrepresentations of material fact to enter the lease agreement. Based upon the jury verdict, the trial court entered judgment rescinding the lease and the personal guaranties and dismissed Hutton's counterclaim. The court also denied Hutton's motion for a new trial or judgment notwithstanding the verdict.

Hutton appeals on four grounds. First, it claims that Telum did not prove by clear and convincing evidence that its reliance on Hutton was justifiable and reasonable. Second, Hutton maintains that the undisputed evidence at trial was that Telum expressly waived its claim for fraudulent inducement by signing the extension agreement with knowledge that the rig was incomplete. Third, Hutton alleges that the district court erred by not allowing the jury to determine whether Telum and Pinder had formed a joint venture. Finally, Hutton argues that the trial court erred in failing to enforce a jury waiver provision of the contract.

On cross-appeal, Telum urges that the trial court erred by denying its request for special damages. Second, Telum alleges error in the court's failure to present its alternative theories to the jury, including negligent misrepresentation, failure of consideration, mutual mistake and unilateral mistake. Finally, Telum claims that the trial court wrongly excluded evidence purporting to show that Welling had embezzled $40,000 from Hutton in connection with the Telum lease. Because of its dispositive effect, we will deal with the jury-waiver issue. We reverse and remand.

II.

After Hutton counterclaimed, Telum demanded a jury trial. Hutton opposed this demand, relying on ¶ 16(b) of the master lease agreement between the parties which provided in part that the "[l]essee waives all right to trial by jury in any litigation arising herefrom or in relation hereto." Exhibit 1. The trial court granted Telum's request for a jury trial, rec. vol. IV at 26, and denied Hutton's motion to reconsider that ruling, rec. vol. XII at 9. In answers to special interrogatories, the jury found that Telum, without knowledge of the relevant facts, was induced to enter the lease agreement as a result of Hutton's material misrepresentations. Upon the jury's finding of fact, the trial court entered judgment in favor of Telum, dismissing Hutton's counterclaim, ordering rescission of the lease agreement and awarding Telum restitution with interest and costs.

On appeal, Hutton argues that the trial court erred in failing to enforce the jury waiver provision of the contract without proof that the waiver provision was itself fraudulently induced. We agree.

The right to a jury trial in the federal courts is governed by federal law. *Simler v. Conner*, 372 U.S. 221, 221-22, 83 S.Ct. 609, 609-10, 9 L.Ed.2d 691 (1963) (per curiam) (jury trial right controlled by federal law to

insure uniformity in exercise required by seventh amendment). Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy. *McCarthy v. Wynne*, 126 F.2d 620, 623 (10th Cir.), *cert. denied*, 317 U.S. 640, 63 S.Ct. 31, 87 L.Ed. 515 (1942); *see Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir.1986) (right to jury trial, although fundamental, may be knowingly and intentionally waived by contract); *K.M.C. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir.1985) (considering it "clear that the parties to a contract made by prior written agreement waive the right to jury trial").

Appellees acknowledge the possibility of waiver but rely on several cases where courts have refused to uphold contractual jury waiver provisions. *See National Equip. Rental v. Hendrix*, 565 F.2d 255 (2d Cir.1977); *Dreiling v. Peugeot Motors of America*, 539 F.Supp. 402 (D.Colo. 1982). These decisions relied on facts such as inconspicuous fine print or a gross disparity in bargaining power to invalidate jury waiver provisions. Telum and Hutton, on the other hand, were both sophisticated parties, and the provision here was in the normal print size of the contract. Moreover, the trial judge did not invalidate the waiver based on such findings, but rather seemed to conclude that Telum's allegations of fraud in the inducement relating to the contract as a whole were sufficient to vitiate the provision. Rec. vol. IV at 16-17; *id.* vol. XII at 8-9.

The parties have not cited any federal cases dealing specifically with this issue, and we have found none. Appellants urge us to accept by analogy the federal cases dealing with the effect of fraud in the inducement upon the enforceability of contract arbitration clauses. Both the United States Supreme Court and this court have held that allegations of fraud in the inducement relating specifically to an arbitration provision may suspend application of such a provision. Allegations of fraud in

the inducement going to the contract generally, however, have been held not to affect the agreement to arbitrate.[1] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 1805-06, 18 L.Ed.2d 1270 (1967); *Meyer v. Dans un Jardin, S.A.*, 816 F.2d 533, 538 (10th Cir.1987). This analogy is especially appropriate here because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury. *See Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) ("[a]rbitration differs radically from litigation, and one who chooses it must be content with its informalities and looser approximations").[2] For these reasons, we hold that the trial judge erred in ruling that general allegations of fraud are sufficient to invalidate a jury waiver provision. Appellees were not entitled to a jury trial as a matter of law. Accordingly, we vacate the judgment entered by the trial court and remand for a new trial without a jury.

---

[1] Although this result was based on language found in § 4 of the United States Arbitration Act of 1925, the Court noted that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 1806 n. 12, 18 L.Ed.2d 1270 (1967). Thus, according to the Court, to make enforceability of arbitration clauses consistent with other contracts, arbitration could be suspended if fraud were specifically alleged to have induced the making of the arbitration agreement. *Id.*

[2] This reasoning is not inconsistent with the strong federal policy favoring arbitration. *See Perry v. Thomas*, —— U.S. ——, 107 S.Ct. 2520, 2525, 96 L.Ed.2d 426 (1987); *Peterson v. Shearson/American Express*, 849 F.2d 464, 465-66 (10th Cir. 1988) ("[w]hen a contract mandates arbitration, courts generally will enforce the arbitration clause absent a waiver"). Given that arbitration involves less procedural protection than a full judicial proceeding, the policy favoring enforcement of contract arbitration clauses strengthens our analogy.

III.

We now address evidentinary issues raised on appeal and cross-appeal. First, Hutton argues that the trial judge erred by failing to admit a financial statement for the purpose of showing the existence of a joint venture between Telum and Pinder.

Hutton offered a financial statement containing an account receivable referring to the "Telum joint venture." Rec. vol. IX at 895-96. Pinder testified that the receivable reflected an amount owed to J.P. Exploration Co. by himself or a related company for construction of the rig. *Id.* at 896. Counsel for Telum objected on the grounds of materiality, asserting that the statement showed a debt owed by Pinder and not by Telum. The trial judge sustained the objection. *Id.*

Materiality of an item of evidence refers to whether or not that evidence relates to a fact of consequence to the determination of an action. 1. J. Weinstein and M. Berger, Weinstein's Evidence § 401[3] (1986). Although the objection was made and sustained on the basis of materiality, the concept of materiality is now embodied within the broader notion of relevance as defined in the federal rules: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact *that is of consequence to determination of the action* more probable or less probable than it would be without the evidence." Fed.R. Evid. 401 (emphasis added). A trial court has broad discretion to determine whether evidence is relevant, and its decision will not be reversed on appeal absent a showing of clear abuse of that discretion. *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 825 (10th Cir.1986).

Substantive law, in this case Utah law, determines which facts are of consequence in a given action. 1 J. Weinstein and M. Berger, Weinstein's Evidence § 401[3] (1986). Under Utah law, the knowledge of a joint

venturer with regard to the subject of the venture is imputed to the other joint venturers. Utah Code Ann. § 48-1-9 (1981) (knowledge of partner charged to partnership); *Hammer v. Gibbons & Reed Co.*, 29 Utah 2d 415, 510 P.2d 1104, 1105 (1973) (joint ventures bear partnership relation to each other). If, as joint venturers, Pinder's knowledge that the rig was not complete at the time of closing could be attributed to Telum, then the joint venture issue would clearly relate to whether Telum in fact relied upon Welling's misrepresentations. As the evidence in question referred specifically to the alleged joint venture, we hold that the trial court abused its discretion in refusing to admit the financial statement.

IV.

On cross-appeal, Telum argues that the trial court erred in refusing to permit Telum to introduce evidence showing that Welling, as Hutton's agent, embezzled $40,000 in connection with the Telum lease. Upon Hutton's objection, the trial judge excluded the evidence as both irrelevant and inflammatory. Rec. vol. X at 1075.

Telum argues that the proffered testimony was relevant 1) to impeach Welling, 2) to show Welling's intent and motive in making misrepresentations to Telum and 3) to show that Telum should not be responsible for the $40,000 which was included as part of the equipment cost owed on the lease to Hutton.

The trial court's decision to exclude evidence as irrelevant is within its sound discretion and will not be reversed absent an abuse of discretion. *Hill*, 790 F.2d at 825. First, Telum fails to show why Welling's purported embezzlement from Hutton would affect the amount that Telum owes Hutton under the lease, assuming the lease were held valid. Further, during pretrial discussions, counsel for Telum acknowledged that there was no dispute as to what payments were agreed to under the lease and which of those payments were made.

Rec. vol. V at 31. Thus, the trial judge did not abuse his discretion by considering the alleged embezzlement irrelevant when offered to mitigate Telum's obligation to Hutton.

Evidence of the alleged embezzlement had some relevance to Welling's motive in making the misrepresentations charged by Telum, and for impeachment.[3] Even if relevant, however, the trial judge may properly exclude evidence "if its probative value is substantially outweighed by the danger of prejudice." Fed.R.Evid. 403; *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1395 (10th Cir.1987). A determination to exclude evidence under this rule is similarly within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Id.* at 1396.

In making the Rule 403 determination, the district judge must balance the relevance of the evidence with its potentially prejudicial effect. *Id.* Further, this balancing task "is one for which the trial judge, because of his familiarity with the full array of evidence in the case, is particularly suited." *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir.1977). We cannot say that the trial judge abused his discretion. In light of the inflammatory nature of the evidence regarding the alleged embezzlement, it was within the discretion of the trial judge to exclude that evidence, and we sustain his ruling.

V.

On cross-appeal, Telum argues that the trial court erred by denying Telum's request for special damages or reimbursement. As part of its restitution claim, Telum

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[3] Hutton argues that the application of Rule 608(b), regarding the admissibility of specific instances of conduct other than convictions for attacking credibility, would preclude the use of this evidence to impeach welling. Appellant's Reply Brief at 27-28. However, the terms of Rule 608(b) would not preclude *any* testimony on the subject but instead would forbid the resort to the use of extrinsic evidence. Fed.R.Evid. 608(b).

sought reimbursement for money expended in trying to repossess the rig and collect insurance proceeds after the sale to a third party of J.P. Exploration. Following a post-trial hearing on the matter, the trial court denied Telum's motion for reimbursement. Rec. vol. I at 123-24. Because the order of the trial court contains no findings of fact or conclusions of law, we decline to review it on appeal. Instead, we vacate the order denying reimbursement and remand the issue for consideration upon retrial.

VI

The district court judgment based on the jury verdict and the order denying reimbursement are VACATED, and the case is REMANDED to the district court for a new trial consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November 25, 1988

Before Honorable William J. Holloway, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, and Honorable Luther L. Bohanon, District Judge.*

No. 86-1375
86-1496

TELUM, INC., a Nebraska corporation,
EARL K. COOK and CARL R. KING,
Plaintiffs-Appellees
and Cross-Appellants,

vs.

E. F. HUTTON CREDIT CORPORATION, a corporation,
Defendant-Appellant
and Cross-Appellee.

This matter comes on for consideration of Appellees and Cross-Appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

---

* Honorable Luther L. Bohanon, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. C83-0187J

TELUM, INC., a Nebraska corporation,
EARL K. COOK, and CARL R. KING,
Plaintiffs,

vs.

E. F. HUTTON CREDIT CORPORATION,
a Delaware corporation,
Defendant.

E. F. HUTTON CREDIT CORPORATION,
a Delaware corporation,
Counterclaimant,

vs.

TELUM, INC., a Nebraska corporation,
EARL K. COOK, and CARL R. KING,
Counterdefendants.

JUDGMENT (Corrected)

This action came on for trial before the Court and a jury, Honorable Bruce S. Jenkins, United States District Judge presiding, on March 4, 1985, and Reed L. Martineau, Michael R. Carlston and Rex E. Madsen of Snow, Christensen & Martineau having appeared on behalf of

plaintiffs and counterdefendants, and Francis M. Wikstrom and T. Patrick Casey of Parsons, Behle & Latimer appearing on behalf of defendant and counterclaimant.

The issues having been duly tried and the jury having duly rendered its verdict, and the Court now further finding and concluding as follows:

1. That defendant's counterclaim should be dismissed with prejudice;

2. That plaintiffs are entitled to rescission of the lease with defendant; and

3. That the plaintiffs are entitled to recover from defendant the sum of $140,639.08 with interest thereon at ten percent (10%) per annum from and after October 1, 1982 to the date of this Judgment and at the rate of 7.71% per annum from and after the date of this Judgment until paid;

IT IS HEREBY ORDERED AND ADJUDGED:

1. That defendant's counterclaim be, and it hereby is, dismissed with prejudice;

2. That the Master Lease between plaintiffs and defendant be, and it hereby is, rescinded, terminated and declared to be of no further force or effect;

3. That plaintiff Telum, Inc. have and recover from defendant the sum of $140,639.08 together with interest thereon at ten percent (10%) per annum from and after October 1, 1982 to the date of this Judgment and from and after the date hereof until paid at the rate of 7.71% per annum; and

4. That plaintiffs are awarded their costs incurred herein in an amount to be determined.

DATED this 5 day of March, 1986.

Copies mailed to counsel 3/7/86: mw
Reed L. Martineau, Esq.
F. Robert Reeder, Esq.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States District Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing Judgment (Corrected) to the following on this 4th day of March, 1986:

Reed L. Martineau, Esq.
Michael R. Carlston, Esq.
Rex E. Madsen, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellees
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/s/ [Illegible]

(2)

Supreme Court, U.S.
FILED
MAR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TELUM, INC., EARL K. COOK AND CARL R. KING,
Petitioners,

v.

E. F. HUTTON CREDIT CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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March 27, 1989

**Counsel of Record*

LIST OF PARTIES

Respondent Chrysler Capital Corporation is a wholly-owned subsidiary of Chrysler Financial Corporation which, in turn, is a wholly-owned subsidiary of Chrysler Corporation. At the time of the transaction at issue in this case, the name of the company was International Paper Credit Corporation, and the company was a wholly-owned subsidiary of International Paper Corporation. Prior to the lawsuit, the stock of respondent was acquired by the E.F. Hutton Group and the name was changed to E.F. Hutton Credit Corporation. In 1985, respondent was acquired by Chrysler Financial Corporation and the name was changed to Chrysler Capital Corporation. For sake of convenience and consistency with the proceedings below, respondent will be referred to herein as "Hutton."

Respondent has no subsidiaries other than wholly-owned subsidiaries. Its affiliated companies are too numerous to list here and are therefore listed in Appendix G.

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Respondent, Chrysler Capital Corporation, formerly known as E.F. Hutton Credit Corporation ("Hutton"), respectfully requests that this Court deny the Petition for Writ of Certiorari by which the petitioners, Telum, Inc. ("Telum"), Earl K. Cook and Carl R. King, seek review of the decision of the United States Court of Appeals for the Tenth Circuit. That decision is reported at 859 F.2d 835.

STATEMENT OF THE CASE

Hutton was a Delaware corporation engaged in the business of equipment financing. Telum, a Nebraska corporation with its principal place of business in Utah, was in the business of operating truck stops in the mid-western and western United States. The parties entered into an agreement in Utah whereby Hutton purchased from J.P. Exploration, Inc., an oil rig which was then leased to Telum. Telum's primary motivation for entering into the transaction was to obtain a tax shelter for a portion of its income. Telum took an investment tax credit and subleased the rig to J.P. Exploration. J.P. Exploration was responsible for assembling and operating the rig in Oklahoma. 859 F.2d at 836. Possession of the rig never changed hands and neither Telum nor Hutton inspected the rig prior to closing in July, 1980.

In the lease agreement between the parties, Telum waived "all right to trial by jury in any litigation arising herefrom or in relation hereto." *Id.* at 837. Similarly, petitioners Cook and King, as guarantors, waived "trial by jury in any action or proceeding arising out of, under, or by reason of [the] guaranty or any other dispute between Guarantor and [Hutton]." Record, Exhibits 9 and 10.

For approximately two years, Telum and J.P. Exploration made their respective lease and sublease payments. In the summer of 1982, however, the oil drilling market was in a deep decline and J.P. Exploration was sold to a third party who discontinued the sublease payments. Telum attempted to repossess the rig. Telum claims that thereafter, in January 1983, it discovered for the first time that the rig was not

complete as described in the lease schedule at the time of the closing. *Id.* at 836.

Telum brought this diversity action in the District of Utah seeking rescission of the lease and restitution of the money it had paid to Hutton. Telum contended that Hutton made a number of misrepresentations which wrongfully induced Telum to enter into the lease. It also sought rescission on other theories, including breach of contract and failure of consideration. Telum did not request a jury trial at that time. Hutton counterclaimed to enforce the lease and guaranties. In its reply, Telum demanded a jury trial. *Id.* at 836-37.

In connection with motions for summary judgment, Hutton requested a ruling that petitioners were not entitled to a jury trial because of the jury waiver agreement. App. A at 2a. The trial court denied the request without an evidentiary hearing and Hutton moved for reconsideration, again arguing as a matter of federal law that mere allegations of fraud in the inducement of the lease were not sufficient to deny Hutton the benefit of the jury waiver agreement where there was no claim that the jury waiver itself was induced by fraud. App. B at 4a-8a. The district court denied the motion without an evidentiary hearing or findings, apparently concluding "that Telum's allegations of fraud in the inducement relating to the contract as a whole were sufficient to vitiate the [jury waiver] provision."[1] 859 F.2d at 837; App. C at 9a.

Approximately five months later, the matter proceeded to trial before a jury. The trial court did not conduct a pre-trial hearing, as the Petition implies, in which Telum put on its proof of fraud before the court, sitting without a jury, nor did the trial court find that there was "sufficient evidence of fraud to permit the court provisionally to set aside the jury waiver provision pursuant to state law . . . ." Petition for Certiorari, at 3-4. Rather, the record reflects that the motion to reconsider had been denied five months earlier without an evidentiary hearing or findings, and the district court never

[1] In subsequent pre-trial arguments on various procedural matters, Hutton continued to take the position that Telum was not entitled to a jury trial, but the court never again entertained the issue.

again considered Telum's entitlement to a jury trial. The hearing apparently referred to in the Petition resulted from a motion *in limine* filed by Hutton requesting the trial court to determine, outside the presence of the jury, whether petitioners could present a *prima facie* case of fraud before allowing the jury to hear evidence of fraud under an exception to the parol evidence rule. [2] App. D at 11a. The evidentiary hearing was held after the jury trial had begun and after some testimony had been heard by the jury. The issue of whether the case would be tried to a judge or a jury had been long since decided and was not before the court at that time.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit held that the trial court erred in its pre-trial ruling that general allegations of fraud were sufficient to invalidate a jury waiver provision and also held that petitioners were not entitled to a jury trial as a matter of federal law in the absence of a claim that the jury waiver provision itself was induced by fraud. 859 F.2d at 838. In addition, the court of appeals reversed the trial court's ruling excluding certain evidence of a joint venture between Telum and a principal of J.P. Exploration. *Id.* at 838-839. The case was remanded for a new trial. Telum's petition for rehearing and suggestion for rehearing *en banc* were both denied. Petition for Certiorari at 11a.

REASONS FOR DENYING THE PETITION

This case does not present the substantial *Erie* issues that petitioners suggest, nor does it offer an appropriate opportunity for the Court to provide further guidance regarding the proper application of the Rules of Decision Act, 28 U.S.C. § 1652. In order to make this case appear to present an issue under the Rules of Decision Act, the Petition contrives a rule of state law which supposedly conflicts with the holding of the court of appeals. Petitioners argue that the law of both

[2] The hearing is reported as part of the trial transcript at Vol. I, pp. 71-198. Due to its length, the partial transcript is not reproduced as part of the Appendix. Petitioners' characterization of the hearing is markedly different from that contained in their brief on appeal to the Tenth Circuit. App. F at 23a.

Utah and New York "clearly" provides that fraud in the inducement of a contract nullifies a jury waiver provision contained therein. However, the state cases cited by petitioners do not establish such a rule nor do they articulate a procedure for a trial court to follow in determining whether to enforce a jury waiver provision in the face of mere allegations of fraud.

In this case, the Tenth Circuit held that the trial court erred in ruling that general allegations of fraud were sufficient to invalidate a jury waiver agreement. Petitioners ignore this portion of the holding below. Instead, the Petition incorrectly states that the trial court conducted a pre-trial evidentiary hearing at which it held that there was sufficient proof of fraud to "provisionally" set aside the jury waiver agreement.

Given this background, there are several reasons why this Court should decline review. First, there is no conflict between state and federal law requiring the application of the Rules of Decision Act. Petitioners have merely contrived a rule of state law and have mischaracterized the record in order to make that rule appear to apply in this case. Second, the "confusion" among the circuits posited by petitioners is illusory. Third, the ruling of the Tenth Circuit is not in conflict with decisions of this Court. Finally, petitioners did not raise the issue set forth in the Petition in a timely fashion below and should be precluded from raising it here.

1. Review is Not Appropriate Because Petitioners Have Invented a Rule of State Law and Have Mischaracterized the Record in Order to Suggest a Conflict Between State and Federal Law.

a. The Cited Utah and New York Cases Do Not Support Petitioners' Position.

Petitioners argue that it is "settled" under the laws of Utah and New York[3] that a jury waiver provision contained

[3] Petitioners' apparent assertion that the choice of law provision in the lease agreement compels the application of New York law is inconsistent with their principal argument that fraud vitiates the entire agreement, including the jury waiver provision.

in a fraudulently induced contract is not binding on the defrauded party. Petition for Certiorari at 3. Indeed, the entire Petition is premised on the unwarranted assertion that state law clearly would have afforded petitioners a jury trial in this case. Contrary to petitioners' contention, no rule of state law on this issue has been authoritatively declared either by legislative enactment or by a ruling of the highest courts of Utah or New York. The state cases cited in the Petition are silent on the question of whether a judge or jury should be the trier of fact in a dispute over the enforceability of a contract containing a jury waiver provision.

The Utah cases cited by petitioners do not mention either jury waiver provisions or the effect of allegations of fraud on their enforceability. *Frailey v. McGarry*, 116 Utah 504, 211 P.2d 840 (1949), held that a party to a contract who believes he has grounds for rescission must act promptly or he waives the right to rescind. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 P. 687 (1912), was concerned with the grounds upon which a party may seek rescission of a contract and, independent of the rescission issue, the ability of a trial judge to impanel an advisory jury on its own motion, against the wishes of both parties.[4]

Likewise, the New York cases cited in the Petition have nothing to do with the enforceability of jury waiver provisions. In *President and Directors of Manhattan Co. v. Monogram Associates, Inc.*, 276 A.D. 766, 92 N.Y.S.2d 579 (N.Y. App. Div. 1949), an intermediate appellate court held, for obvious reasons, that a contractual provision waiving the defense of fraud is not enforceable. The other New York cases, *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928), and *Kountze v. Kennedy*, 147 N.Y. 124, 41 N.E. 414 (1895), were concerned merely with articu-

[4] In the present case, the trial court did not treat the jury as an advisory jury. The court entered judgment directly on the jury verdict. 859 F.2d at 837.

lating the grounds under New York law for rescission of a contract based on fraud.[5]

None of the cases cited in the Petition holds that mere allegations of fraud are sufficient to vitiate a jury waiver provision. Nor do those cases suggest a procedural rule for dealing with the issue faced by the trial court in this case when confronted with the question of whether to allow a jury trial. Since the trial judge below did not hold an evidentiary hearing on this issue or make findings of any kind, the only basis in the record for the refusal to strike the jury demand is the general allegation of fraud contained in the defense to the counterclaim. 859 F.2d at 837.

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[5] Petitioners have not cited two intermediate appellate court decisions from New York requiring a separate preliminary jury trial on the issue of fraud raised as a defense in a legal action to enforce a contract containing a jury waiver. *Federal Housecraft, Inc. v. Faria*, 28 Misc. 2d 155, 216 N.Y.S.2d 113 (N.Y. App. Term 1961); *Bank of New York v. Cheng Yu Corp.*, 67 A.D.2d 961, 413 N.Y.S.2d 471 (N.Y. App. Div. 1979). The court in *Faria* recognized that it was departing from its own precedent, having previously held that jury waiver agreements are enforceable in the face of general allegations of fraud in the inducement. *Federal Housecraft, Inc. v. Faria*, 216 N.Y.S.2d at 114. The New York Court of Appeals has never recognized either the rule adopted in *Faria* or the reasoning behind it.

Moreover, the *Faria* rule specifically applies only in purely legal actions where fraud is asserted as a defense. This is an important distinction because under New York law, unlike federal law, if a complaint states both legal and equitable causes of action, the plaintiff waives the right to a jury trial on the legal causes of action. *DiMenna v. Cooper & Evans Co.*, 220 N.Y. 391, 115 N.E. 993 (1917); *Leav v. Weitzner*, 268 A.D. 466, 51 N.Y.S.2d 775 (N.Y. App. Div. 1944); *Epstein v. Paganne Ltd.*, 39 A.D.2d 855, 333 N.Y.S.2d 187 (N.Y. App. Div. 1972). Whether a counterclaim defendant in an equitable action retains the right to a separate jury trial on the counterclaim may depend on whether the counterclaim and the defenses to it represent an entirely separate dispute. *DiMenna v. Cooper & Evans Co.*, 115 N.E. at 994-95. In this case, where the complaint seeks purely equitable relief and the compulsory counterclaim, together with the defenses thereto, presents in mirror image the same issues raised by the complaint and answer, it is likely that there would be no right to a jury trial under New York law.

Utah law on the right to a jury trial is considerably less developed, but it is questionable whether Telum would have been entitled to a jury trial under Utah law even in the absence of the jury waiver. Since the case was initially brought as an equitable action and raised predominantly equitable issues, Telum arguably would have had no right to a jury trial in a Utah court. *Coleman v. Dillman*, 624 P.2d 713 (Utah 1981).

b. This Case Does Not Afford the Court an Opportunity to Address the Rules of Decision Act Because There is No Clear Conflict Between State and Federal Law.

Even if petitioners have identified an unresolved issue under the Rules of Decision Act, the absence of authoritatively declared state law in direct collision with federal law makes this case an inappropriate vehicle for consideration of that issue.[6] Assuming *arguendo* that the question should have been decided as a matter of state contract law, the lack of any statement by the highest courts of either Utah or New York as to the nature of that law leaves it to speculation that their rulings would be different from that of the Tenth Circuit.[7] If this Court is inclined to review the question of whether the Rules of Decision Act requires the application of state contract law to determine the effect of contractual provisions dealing solely with procedure, it should await a case where state law readily can be determined and where there is a direct conflict with the federal procedural law at issue. This is not such a case.

Absent a clear state rule, it would be difficult, if not impossible, for the Court to apply the tests it previously has articulated for determining what law governs under the Rules of Decision Act. For example, a balancing of state and federal interests as described in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), would be problematic when there

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[6] Petitioners argue that the Court should grant certiorari in this case in order to review the question orginally posed but not reached in *Stewart Organization, Inc. v. Ricoh Corp., 108 S. Ct. 2239, 101 L.Ed.2d 22 (1988). Petition for Certiorari at 10. This case differs markedly from Stewart Organization* because, in the latter, the Supreme Court of Alabama had clearly articulated a state rule that directly conflicted with the federal law applied by the court of appeals.

[7] It is entirely possible that Utah or New York courts would adopt the same rule applied by the Tenth Circuit, rather than that asserted by petitioners. If petitioners' position were the law, jury waiver clauses would be virtually unenforceable in any case where one party merely alleged that the underlying contract was fraudulently induced. If the party claiming fraud failed in his proof of fraud, the benefit of the jury waiver agreement would be irretrievably lost to the other party to the contract.

is no clearly articulated state law to suggest the scope of those interests or to indicate whether they are in conflict with federal policies. Similarly, the "modified outcome determination" test of *Hanna v. Plumer*, 380 U.S. 460 (1965), would be difficult to apply in this case because, in the absence of conflicting state law, it is impossible to determine whether the outcome would be different in state court.

Furthermore, the circumstances of this case do not raise *Hanna's* fairness concerns relating to the so-called "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468. Since petitioners, as plaintiffs, selected the federal forum themselves, they can hardly complain that they have been the victims of discrimination.

c. Petitioners Have Mischaracterized the Record.

Petitioners apparently concede that mere allegations of fraud are not sufficient to invalidate a jury waiver provision. In order to avoid the consequences of that concession, however, the Petition asserts that a "provisional" finding of fraud, rather than simple allegations of fraud, formed the basis for the district court's ruling. The Petition states that the trial judge "faced a preliminary procedural problem" at the beginning of the trial concerning whether a jury trial should be permitted. Petition for Certiorari at 3. Without citation to the record, petitioners assert:

> If there was no fraud in the inducement of the lease agreement, then under the terms of the contract, petitioners were not entitled to a jury on any issues. . . . To avoid permitting petitioners to defeat the jury waiver provision by a simple allegation of fraud, the district court required petitioners to put on the record their proof of fraud before the court, sitting without a jury. After this preliminary offer of proof, the district court held that there was sufficient evidence of fraud to permit the court provisionally to set aside the jury waiver provision pursuant to state law and allow the jury to determine if there had been a fraud committed.

Id. at 3-4. This claim that the trial judge addressed the problem by reviewing the evidence and "provisionally" setting aside the jury waiver under state law is little more than an exercise in revisionist history. The hearing apparently referred to by petitioners occurred during the trial and had absolutely nothing to do with the jury waiver issue. The jury waiver question had been decided five months earlier on Hutton's motion for reconsideration and was never again considered by the district court.

2. There is No Conflict or Confusion Among the Circuit Courts of Appeals.

Petitioners suggest that this case provides the Court with an opportunity to "resolve the uncertainty that has existed for over two decades among the courts of appeals over the extent to which the Rules of Decision Act reaches jury trial issues in diversity cases." Petition for Certiorari at (i). Petitioners attempt to create the impression that a "tension" exists between the holdings of this Court in *Hanna* and *Byrd,* and that this "tension" has left the lower courts in a state of confusion. Although some commentators have argued that the approaches taken by the Court in these cases are inconsistent, *see, e.g.,* Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma,* 91 Harv. L. Rev. 356 (1977), a review of the circuit decisions cited by petitioners indicates that the "uncertainty" or "tension" is exaggerated.

With the exception of the issue specifically resolved by this Court last term in *Stewart Organization, Inc. v. Ricoh Corp.,* 108 S. Ct. 2239, 101 L.Ed.2d 22 (1988), petitioners have failed to identify a single instance in which the circuits have disagreed over the application of *Erie* Principles to jury trial or other procedural issues. Notwithstanding any theoretical "uncertainty," the cases cited by petitioners do not demonstrate that the courts have experienced any difficulty in harmonizing or applying the principles embodied in *Hanna* and *Byrd.*

The Tenth Circuit's ruling in this case is the only decision by a federal court concerning the effect of allegations of fraud on a contractual waiver of the right to a jury trial. Since

there is no conflict or confusion in the circuits on this issue, this Court's review is not warranted.

3. The Holding of the Tenth Circuit Does Not Conflict with Prior Decisions of this Court.

In *Simler v. Conner*, 372 U.S. 221 (1963), this Court held that the right to a jury trial in a federal diversity action is to be determined as a matter of federal law, stating: "Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." *Id.* at 222. An essential characteristic of the independent federal system for administering justice is the manner in which it "distributes trial functions between judge and jury . . . under the influence—if not the command—of the Seventh Amendment." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. at 537.

Petitioners' attempt to characterize the issue as a substantive question of contract interpretation does not change its essential nature. This case deals with the "narrow confines of the judge-jury relationship" and the procedural question of whether mere allegations of fraud are sufficient to vitiate a jury waiver agreement. Regardless of whether *Byrd* created an "enclave of federal common law," the holding in *Byrd* is rooted in the Seventh Amendment and is consistent with the way in which federal trial judges have apportioned power between judge and jury in the absence of congressional legislation. *See* Bourne, *Federal Common Law and the Erie-Byrd Rule*, 12 Balt. L. Rev. 426, 471 (1983) (discussing *Byrd's* contribution to the *Erie* rule). Despite petitioners' assertion that there are conflicts between *Byrd* and *Hanna*, the holdings of *Byrd* and the Tenth Circuit in this case, insofar as they apply federal law in allocating the decision-making function between judge and jury, are not inconsistent with either the ruling or the dictum of *Hanna*.[8]

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[8] *Hanna* dealt with the applicability of one of the Federal Rules of Civil Procedure and the Rules Enabling Act, 28 U.S.C. § 2072, rather than the Rules of Decision Act.

The effect of the Tenth Circuit's holding is to designate a procedural mechanism for adjudiciating state-created rights, including rescission of fraudulently induced contracts. Under that ruling, a party would be entitled to a bifurcated jury trial if he alleged that the jury waiver agreement itself was induced by fraud. The outcome would determine whether a jury trial would be available on the claim of fraudulent inducement of the underlying contract.

4. Petitioners Did Not Raise this Issue in a Timely Manner Below.

In its original brief on appeal to the Tenth Circuit, Hutton argued this issue exclusively as a matter of federal law. App. E at 15a-18a. Although petitioners did include citations to two New York state court decisions in their brief on appeal, they did not argue that the issue was governed by state rather than federal law. Instead, petitioners based their argument primarily on the Seventh Amendment and federal court decisions under Rule 38 of the Federal Rules of Civil Procedure. App. F at 21a-23a. Petitioners are critical of the court of appeals for simply relying on *Simler v. Conner* and not discussing the choice of law question at length. Such criticism is unwarranted since petitioners never presented this argument to the court of appeals for its consideration.

After the Tenth Circuit had announced its decision, petitioners requested reconsideration *en banc*, raising the state law argument for the first time and contending that *Stewart Organization, Inc. v. Ricoh Corp., supra*, somehow required reconsideration of the jury trial issue. *Stewart Organization* does not, however, represent a substantial change in the law and, as the Tenth Circuit obviously recognized, did not compel reconsideration of an issue not raised in the original briefs filed by the parties.

Failure to properly raise an issue before the court of appeals is sufficient reason for this Court to refuse to consider the issue. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). Merely raising an argument for the first time by way of an unsuccessful petition for rehearing does not constitute

properly raising the issue below. *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958). Since there are no extraordinary circumstances excusing petitioners' failure to timely raise the issue below, this Court should not grant certiorari.

CONCLUSION

Even if the Court were inclined to re-enter the *Erie* arena and provide additional guidance on the application of the Rules of Decision Act, this case presents a poor vehicle to achieve that aim. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 27, 1989

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APPENDIX A

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IN THE

United States District Court

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TELUM, INC., a Nebraska corporation,
Plaintiff,
vs.
E. F. HUTTON CREDIT CORPORATION, a corporation,
Defendant.

MEMORANDUM IN SUPPORT OF REQUEST FOR RULING PURSUANT TO RULE 56(d)

E. F. HUTTON CREDIT CORPORATION, a corporation,
Counterclaimant,
vs.
TELUM, INC., a Nebraska corporation, EARL COOK and CARL R. KING,
Counter-Defendants.

Case No. C83-0187J

* * * * * * * * *

Defendant/Counterclaimant E. F. Hutton Credit Corporation ("Hutton") respectfully submits to the Court the following memorandum in support of its request for a ruling pursuant to Rule 56(d) of the Federal Rules of Civil Procedure regarding matters as to which no substantial controversy exists.

* * *

UNRESOLVED ISSUES

I. WHETHER TELUM IS ENTITLED TO A JURY TRIAL

* * *

C. *The contractual waivers by the Telum bar a jury trial on any issues raised in the Counterclaim.*

Although plaintiffs did request a jury trial in their Reply to the Counterclaim, Telum, Cook and King have each contractually waived the right to jury trial on any issue related in any way to the Lease and the Guaranties. Such contractual waivers are fully enforceable and bar Telum from claiming the right to a jury trial on any issue herein. *McCarthy v. Wynne,* 126 F.2d 620 (10th Cir. 1942). The fact that the present litigation involves a challenge to the validity of the contracts which contain the waiver provision does not render those waivers unenforceable in this action. *Seligson v. Plum Tree, Inc.,* 361 F. Supp. 748 (E.D. Pa. 1973). Hutton has both the legal and contractual right to have this matter tried efficiently and expeditiously to the Court.

* * *

APPENDIX B

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IN THE

United States District Court

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TELUM, INC., a Nebraska corporation,

Plaintiff,

vs.

E. F. HUTTON CREDIT CORPORATION, a corporation,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

E. F. HUTTON CREDIT CORPORATION, a corporation,

Counterclaimant,

vs.

TELUM, INC., a Nebraska corporation, EARL COOK and CARL R. KING,

Counter-Defendants.

Case No. C83-0187J

* * * * * * * * *

E. F. Hutton Credit Corporation ("Hutton") submits the following Memorandum in Support of its Motion to Reconsider this Court's order denying its motion to strike the demand for jury trial:

INTRODUCTION

Hutton and Telum are the lessor and lessee, respectively, under a certain Master Lease Agreement with respect to an oil drilling rig. Earl K. Cook ("Cook") and Carl R. King ("King") are the guarantors of Telum's obligations under that lease. The present action began with the filing of Telum's complaint against Hutton for rescission of the lease, primarily on the grounds of fraud and misrepresentation in the inducement of the lease obligation. Specifically, Telum claims that IPCC, as Hutton was previously known, misrepresented that it had inspected the rig, that the rig was complete, and that the rig's description was accurate. Hutton counterclaimed against Telum seeking enforcement of the lease and recovery of payments due thereunder. Hutton also sought relief from Cook and King on their personal guaranties. In their Reply to the Counterclaim, the Counterdefendants, Telum, Cook and King, assert as defenses essentially the same facts alleged by Telum in its complaint.

The issue of the entitlement of Telum, Cook and King to a jury trial was determined by the Court at the Pre-trial Conference. Under the circumstances, most of the Court's attention was directed toward clarifying and limiting the theories advanced by Telum. Hutton did not have an opportunity to fully argue its position on the jury trial issue, and was therefore unable to effectively present the relevant applicable law to the Court at that time. By this memorandum, Hutton seeks to convince the Court that, because of their contractual waiver of any right to a jury trial in the lease and guaranty agreements, the Counterdefendants are not entitled to a jury trial on the relief sought in Hutton's Counterclaim. At most, they may be entitled to an initial jury determination of the limited issue of whether the jury

waiver provisions of their contracts were fraudulently induced.

Hutton recognizes that the opportunity to have a jury hear and resolve disputes in civil matters is generally considered to be an important right. However, under the circumstances of this case, Hutton's contractual right to have the issues set forth in its Counterclaim determined by the Court is equally important. In both the Complaint and the Reply to the Counterclaim, Telum has attempted to create a general confusion of the relevant issues. It has asserted a number of conflicting and contradictory theories in support of its position in this lawsuit and has refused to stipulate to any meaningful limitation of the facts or issues. Moreover, the Counter-defendants characterize Hutton as a large, impersonal corporate entity in conflict with a small, closely-held company and its individual shareholders. This strategy, combined with the nature of the allegations that have been made by Telum, creates a substantial likelihood of jury confusion and prejudice. On the other hand, the Court is in an unique position to cut through the confusion and to efficiently determine the remaining issues in this lawsuit. That fact is precisely why the parties are now so diametrically opposed on the jury trial issue, and is also why Hutton considers the issue significant enough to request that the Court reconsider its prior ruling.

ARGUMENT

DEFENDANTS' CONTRACTUAL WAIVERS OF A JURY TRIAL ARE FULLY ENFORCEABLE AND EFFECTIVELY PRECLUDE THEIR CLAIM FOR A JURY TRIAL IN THIS ACTION.

In paragraph 16(b) of the Master Lease Agreement, Telum waived "all right to trial by jury in any litigation arising herefrom or in relation hereto." Similarly, in the Guaranties, each of the Guarantors waived "trial by jury in any action or proceeding arising out of, under, on or by reason of this guaranty or any other dispute between Guarantor and IPCC."

It is well established that contractual agreements waiving a trial by jury are fully enforceable against the waiving party. The Tenth Circuit Court of Appeals has stated that such agreements are "neither illegal nor contrary to public policy," and that there is no reason why they should not be enforced. *McCarthy v. Wynne,* 126 F.2d 620, 623 (10th Cir.) *cert. denied,* 317 U.S. 640 (1942). In reaching the same conclusion, the Court in *Smith-Johnson Motor Corporation v. Hoffman Motors Corporation,* 411 F.Supp. 670 (E.D.Va. 1975), stressed the fact that the jury waiver agreement in that case was arrived at as a result of an arm's-length negotiation between experienced and sophisticated businessmen. The agreements in the present case were likewise the result of negotiation between sophisticated business entities, and as such are fully enforceable.

Moreover, jury wavier provisions are enforceable even in actions which challenge the validity of the underlying contracts. In *Seligson v. Plum Tree, Inc.,* 361 F. Supp. 748 E.D. Pa. 1973), the plaintiffs claimed that their franchise agreement with the defendants was violative of the antitrust laws. As such, plaintiffs argued, the jury waiver provision contained in that agreement was likewise invalid and unenforceable. However, the court rejected that argument as "specious," and granted the defendants' motion to strike the demand for a jury trial, stating that "the very issue is the validity of the contract and this is clearly covered by the waiver." 361 F. Supp. at 758.

Contractual jury waiver provisions are, in effect, a variation on contractual provisions specifying the forum in which disputes between the parties will be resolved. Such clauses are generally enforceable, even when the validity of the contract itself is in dispute. Thus, in *M/S Bremen v. Zapata Off-Shore Company,* 407 U.S. 1 (1972), the United States Supreme Court held that a contractual stipulation designating a particular forum for resolution of disputes, which had been negotiated at arm's length between sophisticated businessmen, was *prima facie* valid and would be enforced absent some compelling and countervailing reason not to do so. In order to avoid the application of such provision, the Court

held that the party challenging it must "clearly show that enforcement would be unreasonable or unjust, or that *the clause* was invalid for such reasons as fraud or overreaching." 407 U.S. at 15 (emphasis added). No such showing has been made or even proffered in this case.

Jury waiver provisions are also very similar in their consequences to contractual arbitration clauses, although the latter are a waiver of the judicial process entirely. The United States Supreme Court has enforced arbitration clauses despite allegations that the underlying contracts were invalid. Significantly, the arbitration clause cases draw a distinction between allegations of fraudulent inducement of the entire contract and fraudulent inducement of the arbitration clause itself. Thus, in *Prima Paint Corporation v. Flood & Conklin Manufacturing Company,* 388 U.S. 395 (1967), the Court held that a contractual arbitration clause in a contract was enforceable, despite the plaintiffs' allegation that the contract had been fraudulently induced. The Court found that the arbitration clause was "separable" from the contract, and therefore, would be enforced absent a specific allegation that the clause itself had been induced by fraud.

On the other hand, where the Court found an allegation of fraud to be directed specifically at the arbitration clause, it allowed the plaintiff an initial in-court determination of whether the arbitration clause was fraudulently induced. *See Mosely v. Electronic & Missile Facilities, Inc.,* 374 U.S. 167 (1963).

The parties in this case specifically agreed in paragraph 16 of the lease that the individual provisions of the lease are to be treated as severable and separately enforceable. Thus, like the arbitration clause involved in *Prima Paint,* the jury waiver provisions contained in the Master Lease Agreement and in the Guaranties should be treated as separable agreements which are presumptively valid and enforceable, absent proof of fraudulent inducement of the clauses themselves.

There have been no specific allegations of fraudulent inducement of the jury waiver clauses in the present case. The allegations of fraudulent inducement of the lease agree-

ment do not relate in any way to the jury waiver provision. In the absence of a more specific allegation, the jury waiver provision is valid and fully enforceable.

However, even if the pleadings are deemed sufficient to allow the Counterdefendants to pursue a theory of fraudulent inducement of the jury waiver provision, the Counterdefendants are only entitled to a jury trial on the limited issue of whether the jury waiver provisions themselves were fraudulently induced. If that issue is resolved in Hutton's favor, the Counterdefendants would not be entitled to a jury trial on any of the issues involving the enforceability of their contract obligations.

CONCLUSION

The presentation to a jury, in the manner apparently contemplated by Telum, of the kinds of allegations that have been made in this case could result in substantial confusion and would be prejudicial to Hutton. Such confusion and prejudice is not justified in light of the Counterdefendants' voluntary agreement to try the issues of this case before a court. On the basis of the foregoing authorities, the Counterdefendants' contractual waiver of their right to a jury trial should be enforced. At most, Counterdefendants should be entitled to a jury trial only on the specific issue of fraudulent inducement of the jury waiver provisions. Therefore, Hutton respectfully requests that this Court reconsider its previous ruling on this issue and strike the Counterdefendants' request for a jury trial.

DATED this 31 day of August, 1984.

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APPENDIX C

MINUTES OF THE UNITED STATES DISTRICT COURT FOR DISTRICT OF UTAH

_X_ CENTRAL DIVISION _X_ CIVIL HEARING

___ NORTHERN DIVISION ___ CRIMINAL HEARING

DATE October 1, 1984

Case No. C83-187J TELUM, INC. vs HUTTON CREDIT CORP.

___ HON. ALDON J. ANDERSON ___HON. DAVID K. WINDER
_X_ HON. BRUCE S. JENKINS

Other: _____

Deputy Clerk Hana Shirata Reporter Ned Greenig

APPEARANCE OF COUNSEL

PLAINTIFF	DEFENDANT
Rex E. Madsen	**Francis M. Wikstrom**
Stephen Hill	

CALENDARED FOR: MOTION FOR RECONSIDERATION

Came on for hearing on defendant's motion for reconsideration. Arguments of counsel heard. Court denied the motion for reconsideration.

DEPUTY CLERK hs

APPENDIX D

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IN THE

United States District Court

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TELUM, INC., a Nebraska corporation, *Plaintiff,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant.*	**MOTION *IN LIMINE* OF E. F. HUTTON CREDIT CORPORATION**
E. F. HUTTON CREDIT CORPORATION, a corporation, *Counterclaimant,* *vs.* TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Counter-Defendants.*	**Civil No. C83-0187J**

* * * * * * * * *

E.F. Hutton Credit Corporation ("Hutton"), hereby moves the Court pursuant to the parol evidence rule for an order prohibiting Telum, Inc., Earl K. Cook and Carl R. King (collectively "Telum") from introducing any evidence regarding any alleged representation or promise by International Paper Credit Corporation or any of its agents or representatives ("IPCC"), prior to or contemporaneously with the execution of the subject lease, to the effect:

(1) That the oil rig which is the subject of the lease transaction at issue in this action would be warranted by IPCC to conform with the description incorporated in the lease documents;

(2) That IPCC would be responsible in any fashion for inspecting, appraising, or verifying the accuracy of the description of the subject oil rig; or

(3) That IPCC knew or would in any manner be responsible for determining or ensuring that the subject oil rig was, or would soon be, complete, in place, assembled or operational.

Such evidence would contradict the express terms of an integrated written agreement and would therefore violate the parol evidence rule.

Pursuant to the authority of *Universal Drilling Co. v. Camay Drilling Co.*, 737 F. 2d 869 (10th Cir. 1984), Hutton further requests a hearing *in camera* to determine whether Telum will be entitled to present any of the above-described evidence under any exception to the parol evidence rule.

In addition to the direct introduction of such inadmissible evidence, Hutton requests that the Court expressly prohibit Telum, either through counsel or otherwise, from making or eliciting, either directly or indirectly, any reference to any of the above-described matters, whether in *voir dire* examination, in opening and closing statements, in testimony from Witnesses, or in any other manner whatsoever.

This motion is supported by a Memorandum of Law filed concurrently herewith.

DATED this 19th day of February, 1985.

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APPENDIX E

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Plaintiffs/Appellees,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant/Appellant.*	**BRIEF OF APPELLANT** **Case No. 86-1375**

On Appeal from the United States District Court
District of Utah, Central Division

BRIEF OF APPELLANT

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IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

* * * * * * * *

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING,

Plaintiffs/Appellees,

vs.

E. F. HUTTON CREDIT CORPORATION, a corporation,

Defendant/Appellant.

BRIEF OF APPELLANT

Case No. 86-1375

* * * * * * * * *

Chrysler Capital Corporation, formerly known as E.F. Hutton Credit Corporation ("Hutton"), Appellant in this action, submits the following Brief of Appellant pursuant to Rule 28 of the Federal Rules of Appellate Procedure. Pursuant to a stipulation of the parties which has been filed with the Court, Hutton is deemed the Appellant for purposes of this appeal.

STATEMENT OF THE CASE

This is an action brought by plaintiffs, Telum, Inc., and its principals, Earl K. Cook and Carl R. King, to rescind the finance lease of an oil drilling rig between Hutton and Telum and also to rescind the personal guaranties of Cook and King, on the grounds of fraud and failure of consideration. Hutton filed a counterclaim seeking to enforce the lease and guaranties.

Prior to trial, Hutton moved to strike plaintiffs' jury demand for the reason that plaintiffs had expressly waived

any right to a jury trial by the terms of the lease and guaranties. The trial court, however, refused to enforce those waivers.

After a two-week trial, the court submitted the case to the jury on special interrogatories. The jury found in favor of plaintiffs on the issues of fraudulent inducement and waiver. The court entered judgment rescinding the lease and the personal guaranties and denied Hutton's motion for a new trial or judgment notwithstanding the verdict.

STATEMENT OF ISSUES

* * *

4. Whether the District Court committed error in failing to enforce the jury waiver provisions of the agreements where there was no allegation or evidence that those jury waiver provisions were themselves fraudulently induced.

* * *

IV. THE DISTRICT COURT COMMITTED ERROR IN FAILING TO ENFORCE THE JURY WAIVER PROVISIONS OF THE PARTIES' AGREEMENTS IN THE ABSENCE OF ALLEGATIONS THAT THE JURY WAIVER PROVISIONS THEMSELVES WERE FRAUDULENTLY INDUCED.

In paragraph 16(b) of the lease, Telum waived "all right to trial by jury in any litigation arising herefrom or in relation hereto." (Exh. 1). Similarly, in the guaranties, each of the guarantors waived "trial by jury in any action or proceeding arising out of, under, on or by reason of this guaranty or any other dispute between Guarantor and [Hutton]." (Exh. 9, 10).

Telum's complaint, seeking rescission, was an action in equity in which no jury trial was available. Its only claim to a jury arose out of the counterclaim, which was based on the contract documents. The fact that some of the defenses raised by Telum involved the alleged voidability of the contracts does not alter the fact that Telum and its guarantors

expressly waived a jury trial in any action based on those contracts. If Telum's mere allegation that the contracts are voidable automatically negated the contractual jury waiver, such provisions would virtually always be unenforceable.

It is well established that contractual agreements waiving a trial by jury are fully enforceable against the waiving party. This Court has stated that such agreements are "neither illegal nor contrary to public policy," and that there is no reason why they should not be enforced, *McCarthy v. Wynne,* 126 F.2d 620, 623 (10th Cir.) *cert. denied,* 317 U.S. 640 (1942).

Moreover, jury waiver provisions are enforceable even in actions which challenge the validity of the underlying contracts. In *Seligson v. Plum Tree, Inc.,* 361 F.Supp. 746 (E.D.Pa. 1973), the plaintiffs claimed that their franchise agreement with the defendants violated the antitrust laws, and that the jury waiver provision contained in that agreement was therefore invalid and unenforceable. However, the court rejected that argument as "specious," and granted the defendants' motion to strike the demand for a jury trial, stating that "the very issue is the validity of the contract and this is clearly covered by the waiver." *Id.,* at 758.

Substantial support for Hutton's position comes from cases in which contractual arbitration clauses are enforced in the face of claims of fraudulent inducement. Contractual arbitration clauses are similar in their effect to jury waiver provisions, because the parties to an arbitration clause necessarily give up any right to a jury trial. However, an arbitration clause is considerably more drastic in that it represents, in essence, a waiver of the entire judicial process and denies the parties to the contract not only the right to a jury trial but also many other due process protections afforded by our system of courts.

Nonetheless, the United States Supreme Court has consistently enforced contractual arbitration clauses despite allegations that the underlying contracts were invalid. Significantly, the arbitration clause cases draw a distinction between allegations of fraudulent inducement of the entire contract and fraudulent inducement of the arbitration clause itself.

Thus, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Supreme Court held that a contractual arbitration clause in a contract was enforceable, despite the plantiffs' allegation that the contract had been fraudulently induced. The Supreme Court found that the arbitration clause was "separable" from the contract, and therefore, would be enforced absent a specific allegation that the clause itself had been induced by fraud. In contrast, where there was an allegation of fraud directed specifically at the arbitration clause, the Supreme Court has allowed the plaintiff an initial in-court determination of whether the arbitration clause was fraudulently induced. *See Mosely v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963). If the more drastic waiver of the judicial process embodied in an arbitration clause is regularly enforced, the mere waiver of a right to jury trial should likewise be enforced where there has been no allegation or proof that the clause itself was induced by fraud.

Contractual jury waiver provisions are also, in effect, a variation on contractual provisions specifying the forum in which disputes between the parties will be resolved. Such clauses are generally enforceable, even when the validity of the contract itself is in dispute. Thus, in *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972), the United States Supreme Court held that a contractual stipulation designating a particular forum for resolution of disputes was *prima facie* valid and would be enforced absent some compelling and countervailing reason not to do so. In order to avoid the application of such a provision, the Court held that the party challenging it must "clearly show that enforcement would be unreasonable or unjust, or that *the clause* was invalid for such reasons as fraud or overreaching." 407 U.S. at 15 (emphasis added). No such showing has been made or even proffered in this case.

The parties in this case specifically agreed in paragraph 16 of the lease that the individual provisions of the lease are to be treated as severable and separately enforceable. (Exh. 1). Thus, like the arbitration clause involved in *Prima Paint*, and like the choice of forum clause contained in *M/S Bremen*,

the jury waiver provisions contained in the lease and in the guaranties should be treated as separable agreements which are presumptively valid and enforceable.

* * *

APPENDIX F

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Plaintiffs/Appellees and Cross-Appellants,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant/Appellant.*	**Case No. 86-1375**

On Appeal from the United States District Court
District of Utah, Central Division

BRIEF OF APPELLEES AND CROSS-APPELLANTS

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IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Plaintiffs/Appellees and Cross-Appellants,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant/Appellant.*	**BRIEF OF APPELLEES AND CROSS-APPELLANTS** **Case No. 86-1375**

Appellees and cross-appellants, Telum, Inc., Earl K. Cook and Carl R. King, submit the following brief pursuant to Rule 28 of the Federal Rules of Appellate Procedure:

STATEMENT OF THE CASE

Telum, Inc. ("Telum") brought this action to rescind the lease of an oil drilling rig from E. F. Hutton Credit Corporation ("Hutton") to Telum and also to rescind the personal guarantees of Telum's owners, Carl King and Earl Cook, on the grounds of fraud, breach of contract, failure of consideration, negligent misrepresentation, mutual mistake, unilateral mistake, and constructive fraud. Telum also sought special damages as a result of the fraud committed by Hutton. Hutton counterclaimed seeking to enforce the lease and guaranties.

Following a two-week trial, the jury returned a verdict in favor of Telum, finding that Hutton had fraudulently induced Telum to enter into the lease and that Telum did not know of the fraud committed by Hutton at the time it

signed a subsequent agreement for a three-month extension of lease payments. Based on the jury's verdict, the trial court (1) entered judgment rescinding the lease and the personal guaranties and (2) dismissed Hutton's counterclaim. The trial court also denied Hutton's motion for judgment notwithstanding the verdict.

STATEMENT OF ISSUES

* * *

4. Whether the trial court properly submitted Telum's defenses of fraud and breach of contract to the jury.

* * *

IV. THE TRIAL COURT PROPERLY GRANTED PLAINTIFF TRIAL BY JURY.

Telum's claim of right to trial by jury arose out of Hutton's counterclaim, which was based on the lease and guaranties. Telum asserted various affirmative defenses to the counterclaim, including fraud.

The Seventh Amendment right to trial by jury is fundamental and can only be relinquished knowingly and intentionally. *Johnson v. Zerbst,* 304 U.S. 458 (1938). The courts will indulge every reasonable presumption against waiver. *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1936). Courts, for example, have refused to enforce jury waiver clauses buried in printed forms absent a showing that such clauses were specifically bargained for. *National Equipment Rental, Inc. v. Hendrix,* 565 F.2d 255, 258 (2nd Cir. 1977) (the court refused to enforce jury waiver clauses "set deeply and inconspicuously" in two equipment lease agreements); *Dreiling v. Peugot Motors of America, Inc.,* 539 F. Supp. 402, 403 (D. Colo. 1982) (the court refused to enforce a jury waiver clause, stating that a "constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract"). In *Gardner & North Roofing & Siding Corp. v.*

Champagne, 265 N.Y.S.2d 707, 48 Misc. 2d 716 (1965), the court observed:

> It is settled law that parties may by contract and agreement waive trial by jury regarding future litigation between the parties. However, trial by jury in civil cases is an important right guaranteed by the New York Constitution and cannot be waived unless the intention of the parties is clearly expressed in light of all the circumstances. Such a waiver, being in derogation of constitutional rights, must be strictly and precisely construed against one who submits such an instrument. *The instant writing containing a clause waiving a jury trial buried in the twenty-fifth line of forty lines of small print, single-spaced, unparagraphed, in a case where fraud is alleged in the answer, can hardly be claimed to be an intentional abandonment of a known right or advantage to trial by jury.* [Emphasis added.]

The jury waivers upon which Hutton relies in the present case are in small print, single-spaced, and unparagraphed, and fraud was alleged in reply to the counterclaim. In addition, Hutton insisted that the lease be documented with its standard printed forms. Tr. 528, 1113. Accordingly, there is no evidence that the waivers were bargained for or that Telum knowingly and intentionally waived its right to trial by jury.

Even in cases where a waiver may exist, the Tenth Circuit has repeatedly held that the trial court has broad discretion in determining whether a jury trial should be granted. Under such circumstances, the trial court's decision to grant or deny trial by jury is not to be reversed unless it appears under all the facts and circumstances that the court abused its discretion. *Paramount Pictures Corp. v. Thompson Theatres, Inc.,* 621 F.2d 1088, 1090 (10th Cir. 1980); *United States Fidelity and Guaranty Co. v. Lembke,* 328 F.2d 569, 573 (10th Cir. 1964); *Hazelrigg v. American Fidelity & Casualty Co.,* 241 F.2d 871 (10th Cir. 1957).

The trial court in the present case certainly did not abuse its discretion, but rather acted with utmost care. The general

rule is that where a contract is induced by fraud, the entire contract is voidable. *E.g., President and Directors of Manhattan Co. v. Monogram Associates, Inc.*, 92 N.Y.S.2d 579, 580 (N.Y. Sup. Ct. 1949); *First Acceptance Corp. v. Kennedy*, 95 F. Supp. 861, 878 (D. Iowa 1951). Under this general rule, the jury waiver clauses in the present case could not be enforced because the contract documents containing them were fraudulently induced. In addition, before the trial court would allow the jury to hear any testimony of fraud, it previewed that testimony to determine whether it was sufficient to go to the jury. Tr. 71-152. Only after making its own determination that there was sufficient evidence of fraud did the court permit the jury to hear that evidence. Tr. 152-198.

The jury ultimately found the contract documents to have been fraudulently induced. The court thereafter made its own finding that Telum was entitled to recission of the contract documents based on Hutton's fraud. Under the circumstances, it cannot be concluded that the court abused its discretion in submitting Telum's defense of fraud to the jury.

* * *

APPENDIX G

Rule 28.1 Listing Of Affiliates

Chrysler Automotive Operations, Inc.
- Chrysler Motors Corporation
  - Acustar, Inc.
    - Acustar Canada Inc.
    - Acustar Holdings, Inc.
    - Auto Electronica de Juarez S.A. de C.V.
    - Chrysler Marine Corporation
    - Chrysler Plastic Products Corporation
    - Coleman Products Company
      - Circuitos Mexicanos de Nogales S.A. de C.V.
    - Ensambles de Interiores Automotrices, S.A. de C.V.
    - Evart Products Company
    - MacDonald Molding, Inc.
    - Mercury Plastics Company
    - Productos Electricos Diversificados, S.A. de C.V.
    - Rantoul Products, Inc.
    - Trenton Chemical Inc.
  - Automotive Finanical Services, Inc.
  - Chrysler Canada Ltd.
    - Chrysler Leasing Ltd.
    - Chrysler Service Contract Company Inc,
    - Commuter Van Pooling Services Ltd.
    - DCI Diesel Canada Inc.
    - 32 Marketing Investment Division Corporations
  - Chrysler Export Corporation
  - Chrysler Foreign Sales Corporation
  - Chrysler Institute of Engineering
  - Chrysler International Corporation
    - Automobili Lamborghini S.p.A.
      - Lamborghini Engineering S.p.A.
    - Chrysler Automotive Services GmbH
    - Chrysler China Services, Inc.
    - Chrysler Italian Imports, Inc.

Chrysler Korea, Inc.
Micoperan Holding B.V.
Chrysler International S.A.
CISA Financial Services S.A.
Chrysler International Services S.A.
CISSA do Brasil Limitada
Chrysler Learning, Inc.
Automotive Education Centers, Inc.
Chrysler Learning Management Corporation
Chrysler de Mexico S.A.
Aire y Temperatura S.A.
Chrysler Overseas Trading Co. Ltd.
Chrysler San Juan, Inc.
Chrysler Service Contract Company
Chrysler Transport, Inc.
Chrysler de Venezuela S.A.
Rootes Motors de Venezuela S.A.
The F M Group, Inc.
Jeep Eagle Corporation
AMC-Tech, Inc.
AMC de Venezuela, C.A.
American Motors International Sales Corporation
American Motors International Trading Corporation
American Motors Leasing Corporation
AMC Leasing Corporation
American Motors Overseas Corporation
American Motors Pan American Corporation
B D Realty, Inc.
Graphic Center, Inc.
Jeep Eagle Sales Corporation
20 Marketing Investment Division Corporations
Jeep Africa, Ltd.
Jeep Australia, Pty., Ltd.
Jeep of Canada Limited
Jeep International Corporation
Jeep Japan, Ltd.

Jeep Motorsports, Inc.
Jeep de Venezuela, S.A.
Cayman Island Investment Co.
A.R.S. Financing, Inc.
A.R.S. Global Services, Inc.
Jeep Caracas, S.A.
MSC, Inc.
WPD, Inc.
NuCar Prep System, Inc.
Pentagroup, Inc.
Pentastar Travel Services, Inc.
Scrib Incorporated
Secorp, Inc.
VPSI, Inc.
51 Marketing Investment Division Corporations
Chrysler Corporation Fund
Chrysler Financial Corporation
Chrysler Auto Receivables Company
Chrysler Capital Corporation
Advanced Leasing Services Number 3, Inc.
Artesia Turbine Cogeneration Corporation
Chrysler Asset Management Corporation
Chrysler Systems Leasing Inc.
CSL Technical Services Inc.
Marine Asset Management Corporation
Trico Marine Operators, Inc., a Louisiana corporation
Chrysler Capital Funding Corporation
Chrysler Capital Investment Services, Inc.
Chrysler Capital Offshore Corporation
Chrysler Capital Public Finance Corporation
Chrysler Capital Realty II, Inc.
Chrysler Capital Transportation Services, Inc.
Chrysler Natural Resources Development Corporation
Chrysler Rail Transportation Corporation
Conemaugh Hydroelectric Projects, Inc.
FPB California Congeneration Corporation
Fresno Biomass Power Corporation

Interconnect I Corporation
Interconnect II Corporation
Jasmin EOR Cogeneration Corporation
LC Leasing, Inc.
O-I Investors, Inc.
Ormesageo IE Corporation
Star Group IE
Geothermal Partners, a California corporation
Poso EOR Cogeneration Corporation
Rocklin Biomass Power Corporation
Salinas Turbine Cogeneration Corporation
Stillwater Geothermal Corporation
Star Group
Stillwater Geothermal Partners, a Nevada corporation
Suffolk Leasing, Inc.
Trona Cogeneration Corporation
TTC Corporation
Whitefield Biomass Energy Corporation
Chrysler Capital Realty, Inc.
Chrysler Bethel Corporation
Chrysler Biscayne Corporation
Chrysler Credit Realvest Inc.
CFC/GECC (New York) Associates I
Chrysler Meridian Corporation
Clinton Holding Corporation
RAE Hotel Corporation
Chrysler Medowcroft Corporation
Chrysler Timberlake Corporation
Chrysler Commercial, S.A. de C.V.
Chrysler Commercial Leasing Corporation
Chrysler Cadre Inc.
Eagle Associates, a New York partnership
Chrysler Consortium Corporation
Pinnacle Partners, a Connecticut partnership
Chrysler Credit Canada Ltd.
Chrysler Credit Holdings Ltd.

Chrysler Finance Limited
Chrysler First Diversified Credit Ltd.
Ariens Credit Ltd.
Mercury Marine Acceptance Ltd.
Sea Ray Credit Ltd.
Snapper Financial Services Corporation Ltd.
Chrysler Life Insurance Company of Canada
Chrysler Credit Corporation
Chrysler Credit de Puerto Rico N.V.
Chrysler Financial Overseas Capital N.V.
Chrysler First Inc.
AIA, Inc. of Pennsylvania
Allentown General Corporation
Chrysler First American Financial Services Corporation
Chrysler First Business Credit Corporation
Chrysler First Consumer Discount Company
Chrysler First Diversified Credit Inc.
Ariens Credit Corporation
Calkins Diversified Credit Inc.
Carver Creditcorp Inc.
Champion Credit Corporation
CompAir Kellogg Credit Corporation
Donzi Credit Corporation
Godfrey Acceptance Corporation
Hupp Credit Corporation
Komatsu Forklift Credit Corporation
Korg Acceptance Corporation
Mercury Marine Acceptance Corporation
Music America Finance Corporation
Promark Credit Corporation
Roth Financial Services Corporation
Sea Ray Credit Corporation
Snapper Financial Services Corporation
Chrysler First Financial Services Corporation (Delaware)
Chrysler First Financial Services Corporation of America (Delaware)

Chrysler First Financial Services Corporation of America (Florida)
Chrysler First Financial Services Corporation of America (Iowa)
Chrysler First Financial Services Corporation of America (Minnesota)
Chrysler First Industrial Loan Company
Chrysler First Information Technologies Inc.
Chrysler First Monetary Corporation
Chrysler First Thrift Company (California)
Chrysler First Wholesale Credit Inc.
Chrysler Insurance Company
Chrysler Life Insurance Company
Chrysler Life Insurance Company of Arizona
Chrysler Leasing Corporation
Chrysler Realty Corporation
ABKO Properties Management Corporation
AMC Properties Corporation
EFH Leasing Corporation
1981 Helicopters Ltd.
1044652 Canada Ltd.
Redisco Canada Ltd.
Chrysler Pentastar Aviation, Inc.
Chrysler Technologies Corporation
Electrospace Systems, Inc.
Pentastar Electronics, Inc.
Pentastar Support Services, Inc.
Telephone Industries, Inc.
Gulfstream Aerospace Corporation (Del.)
Gulf Aero Insurance Company Limited
Gulfstream Aerospace Corporation (GA)
GAC International Corporation
Gulfstream Aerospace Export Corporation
Gulfstream Aerospace F.S.C. Ltd.
Gulfstream Aerospace International Corporation
Gulfstream Aerospace Corporation (OK)
Gulfstream Aerospace Corporation of Texas

Interiores Aeros S.A. de C.V.
7701 Woodley Avenue Corp.

Additional Affiliated Companies:

Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corporation, Ltd.
CFC/CECC (New York)
Chrysler Japan Sales Limited
Diamond-Star Motors Corporation
Ensambladora Carabobo, C.A.
F. F. Developments Limited
Genigraphics Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Mitsubishi Motors Corporation
Officine Alfieri Maserti S.p.A.
Onset Bidco, Inc.
Rambler Motors (AMC) Limited
Synektron Corporation
Valeo/Acustar Thermal

Supreme Court, U.S.
FILED
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No. 88-1384

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TELUM, INC., EARL K. COOK AND CARL R. KING,
Petitioners,
v.
E.F. HUTTON CREDIT CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONERS

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April 6, 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1384

TELUM, INC., EARL K. COOK AND CARL R. KING,
Petitioners,

v.

E.F. HUTTON CREDIT CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONERS

Not surprisingly, respondent in its Opposition makes almost no effort to defend the court of appeals' holding that there is a federal common law basis for denying petitioners a jury trial in this case.[1] Instead, it asserts incorrectly that there are technical reasons why the Court should avoid the Rules of Decision Act issue squarely presented by the holding of the Tenth Circuit. For the reasons we explain below, this case presents a proper vehicle for resolving the choice of law issue decided by the court of appeals and left open in this Court's decision

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[1] Respondent makes a feeble attempt to argue (Opp. 10-11) that the holding below, that federal common law controls, is consistent with certain of this Court's prior decisions. But respondent ignores the irony of relying upon this Court's Seventh Amendment holdings as support for the proposition that there can be a federal law basis for depriving a litigant in federal court of a jury trial.

last Term in *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S.Ct. 2239 (1988).

1. Respondent initially asserts (Opp. 4-6) that it is not clear that there is a conflict between state and federal law on the issue of whether fraud in the inducement of a contract justifies rescission of a jury waiver provision in the contract. Respondent criticizes petitioners' failure to cite a case in either Utah or New York directly on this point. But respondent ignores the general state law rule recognized in both Utah and New York, which requires *all* terms of a contract to be set aside when there has been fraud in the inducement (see Pet. 3 and cases cited therein). Respondent has cited *no* case in any state court which has held that fraud in the inducement, which the jury specifically found to have occurred in this case, does not permit the injured party to rescind a jury waiver provision. Nor does respondent make any effort to explain why a state would not apply the general rule, which denies the defrauding party the benefit of his fraud, to this case. See Pet. 7. In sum, the state law rule is absolutely clear—petitioners were entitled to have the jury waiver provision declared unenforceable. The Tenth Circuit, however, avoided that conclusion by relying upon federal common law. Accordingly, the Rules of Decision Act question is squarely presented in this case.

2. Respondent asks the Court to deny certiorari on the ground that the choice of law issue was not properly preserved below. This is flatly wrong. As respondent concedes (Opp. 11), petitioners relied, in the court of appeals, upon both state and federal law in urging that court to uphold the district court's decision to submit this case to a jury, notwithstanding the contract provision. See Opp. App. 22a-23a (citing state law cases). For its part, respondent never suggested that the court of appeals should employ a federal common law rule in this case. Like petitioners, they submitted the case on the assumption that state law or the Seventh Amendment would control.

Based on the way the case was briefed by the parties, petitioners (and we suspect respondent as well) were completely surprised when the court of appeals held that there was a federal common law basis for holding in a diversity case that petitioners were not entitled to a jury trial. Petitioners then filed for rehearing arguing that under the reasoning of Justice Scalia's dissenting opinion in *Stewart Organization, Inc.*, there was absolutely no basis for choosing a federal rule of decision in this case.

Thus, contrary to respondent's assertion, petitioners unquestionably preserved the choice of law issue. They argued that state law supported their demand for a jury and they explained the error in employing a contrary federal rule at the only point where it became an issue, *viz.*, after the court of appeals mistakenly held that they were not entitled to a jury because of federal common law. Accordingly, the choice of law issue was properly preserved and squarely decided by the court below.

3. Respondent asserts (Opp. 8-9) that we mischaracterized the record in connection with the judge's decision to take evidence on the fraud issue prior to permitting the jury to hear that evidence. We are at a loss to understand respondent's point. It concedes that a hearing took place and the transcript citation for the hearing appears in its own Appendix at 23a. Moreover, it does not dispute that the court made a finding that there was prima facie evidence of fraud before any testimony of fraud was presented to the jury. Thus, the procedure followed did not permit petitioners to set aside a jury waiver provision solely on the basis of an allegation of fraud. It is for that reason that, contrary to respondent's assertion, petitioners have never had any reason to "concede that mere allegations of fraud are not sufficient to invalidate a jury waiver provision." Opp. 8. That is not what this case is about.

What this case is about is the holding of the court below that fraud in the inducement of the contract itself—

whether merely alleged or fully proved—can *never* be sufficient to justify voiding a jury waiver provision in a case brought in federal court under diversity jurisdiction. And what makes that holding remarkable is that the court reached this conclusion by relying solely upon federal common law. That specific holding warrants review by this Court.

4. Once the technical points raised by respondent are correctly discarded, the Opposition does not, and could not, seriously contend that the issue whether a federal common rule can be applied in this case is not an important question worthy of review by this Court. Respondent concedes that there are two apparently inconsistent legal standards under this Court's prior decisions (Opp. 7-8) and that the Court granted certiorari in *Stewart Organization, Inc.* last Term because of the conflict in the lower courts created by the conflicting legal standards (Opp. 9). Obviously, because the Court did not rule on the proper interpretation of the Rules of Decision Act in that case, the conflict in approach among the lower courts remains and the question still warrants the attention of this Court. The holding below could not more squarely present the choice of law issue that the Court granted certiorari to resolve last Term.[2] Nothing has happened during the interim to make the Rules of Deci-

[2] Respondent is plainly mistaken in arguing (Opp. 8) that the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws" are not implicated by the holding in this case. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). If this lawsuit had been filed in state court, the trial court's decision to submit the case to a jury would not have been reversible error. But because the lawsuit was brought in federal court, the jury verdict has been set aside. Obviously, this disparity in result encourages forum shopping and reflects a manifestly inequitable administration of the laws. Moreover, by disregarding the state's interest in discouraging fraud, the holding of the court of appeals also does serious violence to the principles of federalism that are the bedrock of the *Erie* doctrine. *Id.* at 474 (Harlan J., concurring).

sion Act issue any less worthy of review now. Therefore, the Court should grant the petition in this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 6, 1989

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